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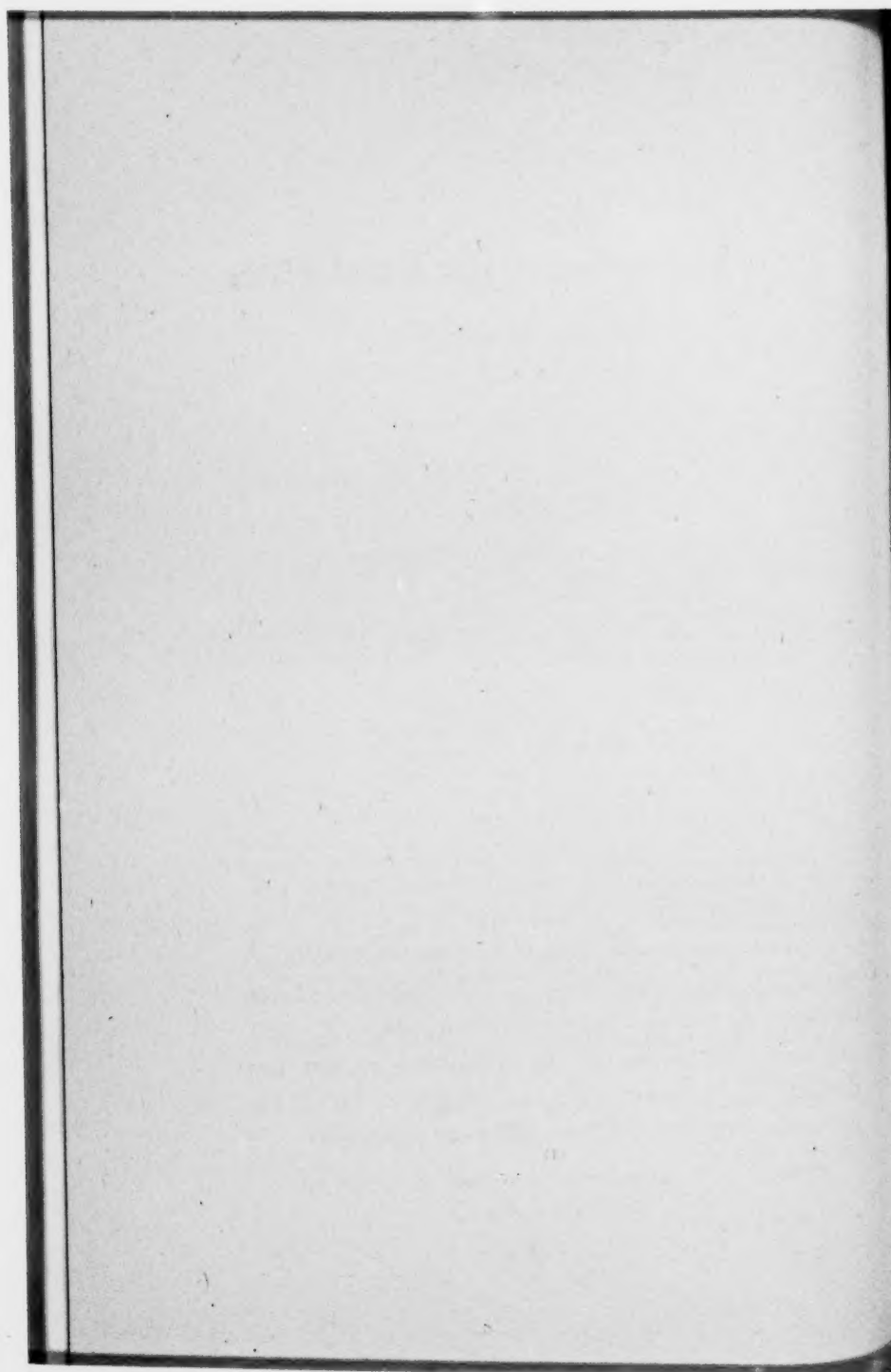
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# In the Supreme Court of the United States

OCTOBER TERM, 1942

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No. 969

AMERICAN GAS AND ELECTRIC COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA

---

BRIEF FOR THE SECURITIES AND EXCHANGE  
COMMISSION IN OPPOSITION

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## OPINIONS BELOW

The findings and opinion of the Commission (R. 13),<sup>1</sup> not yet officially reported, are set forth in the Commission's Holding Company Act Release No. 2749. The opinion of the United States Court of Appeals for the District of Columbia (R. 518) affirming the order of the Commission, and the dissenting opinion of Justice Stephens (R. 531), have likewise not yet been officially reported.

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<sup>1</sup> References are to the printed portion of the record.

### JURISDICTION

The decree of the Court of Appeals was entered February 1, 1943 (R. 548). The petition for a writ of certiorari was filed on April 28, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935 (hereinafter referred to as the "Act").

### QUESTION PRESENTED

More than ten percent of petitioner's outstanding voting securities are owned by Electric Bond and Share Company, a public utility holding company registered as such under the Act. Petitioner applied to the Commission for an order declaring that it was not a "subsidiary company" of Electric Bond and Share Company under Section 2 (a) (8) of the Act. The basic question presented is whether petitioner has shown that its management or policies are not "subject to a controlling influence" by Electric Bond and Share Company within the meaning of the statute.

### STATUTE INVOLVED

The applicable provisions of the Public Utility Holding Company Act of 1935 are set forth in the Appendix, *infra*, pp. 18-20.

### STATEMENT

The petitioner, American Gas & Electric Company ("American Gas"), is a registered holding

company owning all the common stock of eleven electric utility subsidiaries (R. 153). Electric Bond and Share Company ("Bond and Share") owns 17.51% of petitioner's outstanding voting securities (R. 159).

Since more than 10% of petitioner's outstanding voting securities are owned by Bond and Share, it is thus a "subsidiary company" of Bond and Share under Section 2 (a) (8) (A) of the Act, subject to an application for a declaration to the contrary by the Commission under the succeeding paragraph of Section 2 (a) (8). Petitioner brought this proceeding under that paragraph, asking the Commission to declare that it was not a subsidiary company of Bond and Share. The Commission denied the application on the ground that petitioner had not sustained the burden of proving that its management or policies "are not subject to a controlling influence" by Bond and Share within the meaning of clause (iii) of that paragraph. The findings and opinion of the Commission, as sustained by the Court of Appeals, one Justice dissenting, may be summarized as follows:

American Gas, the first subholding company organized by Bond and Share, was incorporated in 1906 (R. 153)<sup>2</sup> to acquire securities of utility

<sup>2</sup> Bond and Share itself had been incorporated only the year before (R. 322). After organizing American Gas, Bond and Share formed American Power & Light Company (1909), National Power & Light Company (1921), American

companies from Electric Company of America (R. 488). In the organization, the details of which were handled by Bond and Share's board of directors and general counsel (R. 198), Bond and Share acquired 8% of American Gas' voting stock, without making any substantial investment (R. 328). In 1929-30, Bond and Share increased its holdings of petitioner's voting stock to the present percentage of 17.51% (R. 328, 489-90). This stock constitutes Bond and Share's most important investment and chief source of income, accounting for 47.5% of its income in 1939 (R. 46, 523).

Bond and Share is the largest single holder of petitioner's stock (R. 462), the balance being distributed among more than 20,000 holders (R. 462-3), of whom no individual or organized group holds as much as 4% (R. 524). The second largest block is held by a former chairman of the board of both Bond and Share and American Gas, and his wife (R. 46, 261, 379, 524).

At the stockholders' meetings, Bond and Share's vote has generally represented about 25%

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& Foreign Power Company (1923), and Electric Power & Light Corporation (1925) (R. 19, 25, 326, 519), all registered holding companies and subsidiaries of Bond and Share under Section 2 (a) (8) of the Act (R. 162-63, 342-43). Bond and Share owns 20.7%, 46.6%, 42.4%, and 47%, respectively, of the outstanding voting securities of these companies (R. 19). They have been collectively referred to throughout this proceeding as the "acknowledged subsidiaries" of Bond and Share.

of the total vote cast (R. 490-1). These meetings have been controlled (through proxies given by more than 95% of those voting, including Bond and Share (R. 168)) by petitioner's proxy committees, whose membership, from 1923 to 1938, consisted exclusively of officers and directors of Bond and Share or its acknowledged subsidiaries (R. 524). Since then, although formal ties no longer exist, Bond and Share has continued to entrust the committees with its vote (R. 170). There has never been a proxy fight or even any group opposition to Bond and Share (R. 374, 491).

The management of American Gas has from the beginning been closely identified with Bond and Share. Each of the two chairmen of the board of American Gas has at the same time been chairman of the board of Bond and Share (R. 142-3). The first officers and eleven of the fifteen original directors were affiliated with either Bond and Share or the law firm serving as its general counsel (R. 198, 444-50). Between 1907 and 1935, close to a a majority, and in 1931-32 an actual majority, of petitioner's board were directors, officers, or employees of Bond and share or of its acknowledged subsidiaries (R. 444-50, 523). At the time of the proceeding, although the number of Bond and Share men on the board of American Gas had been reduced, there were still on the board of Ameri-

can Gas two directors of Bond and Share (one of whom was chairman of the board of both companies (R. 143, 144)), two former directors of acknowledged Bond and Share subsidiaries (R. 180, 182), and three who had become directors or officers during the period when Bond and Share admittedly controlled American Gas (R. 176, 178). Of the remaining seven, two were physically incapacitated and inactive (R. 179, 313-14).

From 1910 to 1936, a clear majority of the executive committee of American Gas were officials of Bond and Share or its acknowledged subsidiaries (R. 523). At the time of the proceeding, the committee was headed by the chairman of the board of Bond and Share (R. 175); two members had for many years been directors of Bond and Share's acknowledged subsidiaries (R. 176, 180); one had a record of cooperation with Bond and Share representatives dating back to the formation of American Gas (R. 180); and only the fifth member had never been affiliated with Bond and Share (R. 177).

Since 1910,<sup>3</sup> American Gas has had two presidents, both closely affiliated with Bond and Share or its acknowledged subsidiaries over a large part of their careers (R. 141-42). Its present president, who has been connected with American Gas

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<sup>3</sup> The first president, with whom the board had some differences, was removed in that year (R. 270, 449-50).

since its organization (R. 179), attained his present position and a very large part of his personal wealth during his thirty-three years' association with the Bond and Share system (R. 37, 141, 256-58).

When American Gas was formed, Bond and Share had not yet developed the service and management force (R. 94, 326) which it afterward created for its later organized subsidiaries. The operating staff of Electric Company of America, which was taken over by American Gas (R. 326) along with the properties, was retained because its work was satisfactory and its personnel had the confidence of the Bond and Share representatives who supervised and directed them (R. 279). While some of their operating policies have differed from those followed by the acknowledged Bond and Share subsidiaries (R. 94-115), these differences are primarily of a local nature (R. 93, 343-44). From 1910 to 1932, petitioner, Bond and Share, and American Power had a service arrangement with the same engineering firm with respect to construction services, reports and advice (R. 218); and, until 1936, American Gas used group purchase contracts of Bond and Share with various manufacturers to obtain discounts available only to acknowledged Bond and Share subsidiaries (R. 425).

Bond and Share conducted all financing operations for American Gas and its subsidiaries from

1907 to 1930 (R. 187-88), and on this ground petitioner has conceded that it was subject to the controlling influence of Bond and Share during those years (R. 271-72, 521). From 1931 to 1937, no financing was undertaken by American Gas or its subsidiaries (R. 376). Since 1937, while petitioner has carried on its own financing operations, the chairman of the boards of Bond and Share and American Gas has kept in close touch with these activities, a large part of the legal work has been done by Bond and Share's general counsel (R. 295, 376), and substantially the same investment bankers who had served American Gas under Bond and Share's fiscal management continued to be used (R. 280-81, 336).

In 1936, when the Commission brought suit against American Gas, Bond and Share, and its acknowledged subsidiaries, to enforce compliance with the Act,<sup>\*</sup> their joint answer to the Commission's complaint alleged that (R. 513-14):

All of the holding company defendants \* \* \* are subsidiary companies of the defendant Bond and Share \* \* \* within the meaning of Section 2 (a) (8) of said Holding Company Act and none of said companies is entitled to exemption or to claim exemption as a subsidiary company under the terms of Section 2 (a) (8) \* \* \*

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<sup>\*</sup> *Securities and Exchange Commission v. Electric Bond & Share Co.*, 18 F. Supp. 131 (S. D. N. Y.), *affirmed*, 92 F. (2d) 580 (C. C. A. 2d), *affirmed*, 303 U. S. 419.

of said Act, or otherwise, or any other section thereof. Exemption of said holding \* \* \* company defendants as holding companies would be comparatively valueless to them as they would remain subsidiary companies subject to all, or practically all, the provisions of said Act.

The law firm which represented them in this suit had been their common general counsel since American Gas was organized (R. 296, 348).

In 1938, after American Gas had filed its application under Section 2 (a) (8), it prepared a formal plan for compliance with Section 11 of the Act (R. 468). Bond and Share, at the time, proposed to submit only tentative proposals which dealt with, among others, the properties of American Gas (R. 202), and asked it not to file the formal plan (R. 203). When, however, American Gas did file its plan, there was no dissent by the Bond and Share representatives on its board (R. 470). About a year later, the chairman of the boards of American Gas and Bond and Share suggested that petitioner withdraw its formal plan and file an informal plan (R. 208); but after counsel for American Gas expressed the opinion that it would be a mistake to withdraw it, "the thought was not pressed and the subject was passed over" (R. 209).

On this record the Commission determined that American Gas had not sustained its burden of proving that it is not a subsidiary of Bond and Share.

## ARGUMENT

The sole issue is whether there is a rational basis for the Commission's determination that American Gas has not sustained the burden of showing that it is not subject to the controlling influence of Bond and Share. The decision of the court below affirming the Commission's order is correct and does not call for further review.

1. Since 17.51% of petitioner's outstanding voting securities are owned by Bond and Share, petitioner is a "subsidiary company" of Bond and Share under Section 2 (a) (8) (A) of the Act. However, the Commission, upon application, is required to declare petitioner not to be a subsidiary company of Bond and Share if petitioner can prove by a preponderance of the evidence that it meets all of the three statutory conditions,<sup>5</sup> one of which reads, in pertinent part, as follows:<sup>6</sup>

(iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company \* \* \*.

<sup>5</sup> *Detroit Edison Co. v. S. E. C.*, 119 F. (2d) 730, 739 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey v. S. E. C.*, 129 F. (2d) 899, 902 (C. C. A. 3d), certiorari denied, 317 U. S. 691; *Hartford Gas Co. v. S. E. C.*, 129 F. (2d) 794, 796 (C. C. A. 2d); *Pacific Gas & Electric Co. v. S. E. C.*, 127 F. (2d) 378, 382 (C. C. A. 9th), argued on rehearing December 1942.

<sup>6</sup> The Commission deemed it unnecessary to consider the questions raised under clauses (i) and (ii) of Section 2 (a) (8) since the petitioner did not meet the condition of clause (iii). These clauses are set out in the Appendix, *infra*.

The issue was one of fact to be determined by the particular circumstances of this case. *Rochester Telephone Corp. v. U. S.*, 307 U. S. 125, 145. The Commission was required to look for "controlling influence" in "varied and subtle forms" of corporate interrelationships.<sup>7</sup> Sen. Rept. 631, 74th Cong., 1st sess., p. 23; H. Rept. 1318, 74th Cong., 1st sess., p. 9. Since American Gas was for twenty-six years, until 1931, admittedly subject to the controlling influence of Bond and Share, the question of the weight to be given the passage of time and the subsequent efforts to create a status of independence was for the Commission to determine.<sup>8</sup>

The voluntary withdrawal of all but two acknowledged Bond and Share men from the board and executive committee of American Gas reflected a program of escape from the impact of the Holding Company Act, rather than an asser-

<sup>7</sup> See *Detroit Edison Co. v. S. E. C.*, 119 F. (2d) 730 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey v. S. E. C.*, 129 F. (2d) 899 (C. C. A. 3d), certiorari denied, 317 U. S. 691; *Hartford Gas Co. v. S. E. C.*, 129 F. (2d) 794 (C. C. A. 2d.); *Pacific Gas & Electric Co. v. S. E. C.*, 127 F. (2d) 378 (C. C. A., 9th), argued on rehearing December 1942. Cf. *Morgan Stanley & Co. v. S. E. C.*, 126 F. (2d) 325 (C. C. A. 2d).

<sup>8</sup> *National Labor Relations Board v. Southern Bell Telephone & Telegraph Co.*, decided May 3, 1943, Nos. 460-461, this Term: "Its conclusion is an inference of fact which may not be set aside upon judicial review because the courts would have drawn a different inference." In the present case the inference was not set aside, and petitioner must maintain that it was required to be set aside.

tion of independence on the part of petitioner. Similarly, Bond and Share in 1935 terminated its formal representation on the boards of its acknowledged subsidiaries, without relinquishing control over them. (R. 348.) The present officers and directors of American Gas owe their positions to associations with Bond and Share in the years when American Gas was concededly subject to its control. Bond and Share's continued confidence in the present management of American Gas is expressed in its uninterrupted practice of delivering its vote to petitioner's proxy committees.

In the same way, the advent of independent financing by American Gas was not the result of any dispute between it and Bond and Share but was brought about rather by the passage of the Holding Company Act and the strategic maneuvers of petitioner and Bond and Share with regard to regulation thereunder. Bond and Share's influence over petitioner's financing still persisted in the activities of the common chairman of the boards, in the employment of the same general counsel, and in the continued use of the same investment houses. The withdrawal of petitioner from Bond and Share's group-purchase contracts and the retirement of petitioner's president as director of admitted Bond and Share subsidiaries were likewise made advisable by the passage of the Act and by petitioner's application under Section 2 (a) (8).

The difference of opinion between petitioner and Bond and Share over methods of complying with Section 11 of the Act was dissipated without any substantial conflict, and petitioner's plan was filed with the approval of the Bond and Share representatives on its board. Moreover, the Commission found that the alleged differences between the two plans (insofar as Bond and Share's plan dealt with petitioner's properties) were more apparent than real. (R. 57-58.) "Under both proposals, if the Commission were to accept the plans, as filed, applicant and its system would remain substantially unchanged." (*Ibid.*)

Against these indicia of petitioner's asserted present independence, the Commission considered the persistent elements of Bond and Share's historic influence over its organization, development, and management. Cf. *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 600. On the whole record it appeared that the profitable nature of Bond and Share's investment in petitioner, its predominant voting position, the continuance of Bond and Share personnel and tradition in American Gas, and, indeed, the very nature of Bond and Share's business,<sup>9</sup> combined to provide both incentive and

<sup>9</sup> Electric Bond and Share Company, Report to Stockholders, December 31, 1939, p. 8:

"The Electric Bond and Share Company is not an investment banker, for it does not deal in securities. It is not an investment trust, for it does not have a changing portfolio of securities of companies in which it has no continuing interest and as to which it has no managerial responsibility. On the contrary, it is the parent company in a large

capacity to make petitioner continue responsive to Bond and Share's desires. Compare *N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241. As the court below observed (R. 529):

Petitioner may have advanced, in the terminology of empire, from status as dependency or colony to one of a dominion, but it has not become an independent empire as a matter of law.

2. Petitioner contends that the Commission and the court below have adopted an erroneous interpretation of the statutory phrase "controlling influence." We submit that this contention is unfounded. The interpretation adopted by the Commission and the court is completely in harmony with that approved by all the courts which have dealt with this problem.<sup>10</sup>

The Commission has in this case, as in previous cases, interpreted the phrase "controlling influ-

and successfully public-utility system, which it has developed, financially and technically, from the early days of the electric industry down to the present time."

(Unprinted Transcript of Record, Vol. XI, p. 4461.)

<sup>10</sup> *Detroit Edison Co. v. S. E. C.*, 119 F. (2d) 730 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey v. S. E. C.*, 129 F. (2d) 899 (C. C. A. 3d), certiorari denied, 317 U. S. 691; *Hartford Gas Co. v. S. E. C.*, 129 F. (2d) 794 (C. C. A. 2d); *Pacific Gas & Electric Co. v. S. E. C.*, 127 F. (2d) 378 (C. C. A. 9th), argued on rehearing December 1942. In the *Pacific Gas* case the majority view of the meaning of "controlling influence" was consistent with that of the other decisions although the opinion did contain a new interpretation of the portion of the section dealing with "public interest."

ence" to require something less in the form of influence over the management or policies of a company than "control." It embraces a position of domination whether or not dominion is overtly exerted. The form in which a "controlling influence" is exercised is, however, unimportant; it is the fact of "controlling influence" rather than the device employed to achieve it that is important. *H. M. Byllesby & Company*, 6 S. E. C. 639 (1940). The determination of this fact has frequently been a troublesome question, necessitating, as in this case, the most thorough exploration of historical and potential relationships between the companies involved. Cf. *Engineers Public Service Co.*, Holding Company Act Release No. 2897, July 24, 1941, p. 35. As the interpretation of the expert body charged with the administration of the Act, this construction of "controlling influence" is entitled to,<sup>11</sup> and has been given, great weight.<sup>12</sup>

Petitioner's references to the legislative history of Section 2 (a) (8) are beside the point (Pet. Br., pp. 13-16). Senator Wheeler's remarks were directed generally to the type of regulation which the Act provides rather than to precise definitions. Viewed in their context these state-

<sup>11</sup> *Gray v. Powell*, 314 U. S. 402, 412.

<sup>12</sup> *Detroit Edison Co. v. S. E. C.*, 119 F. (2d) 730 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey v. S. E. C.*, 129 F. (2d) 899 (C. C. A. 3d) certiorari denied, 317 U. S. 691; *Pacific Gas & Electric Co. v. S. E. C.*, 127 F. (2d) 378 (C. C. A. 9th), argued on rehearing, December 1942.

ments describe merely the more usual situations embraced by the Act and do not attempt to deal with all variations. The committee reports cited by petitioner make no attempt to delimit the phrase "controlling influence." Instead, they indicate an intention to provide flexibility "in order that title I can meet the varied and subtle forms which corporate interrelationships have in the past and will in the future take." (Quoted in Pet. Br., p. 15.)

3. The manner in which the standards of Section 11 will apply to petitioner as a subsidiary of Bond and Share is irrelevant to the determination of its status under the Act, and affords no basis for further review by this Court. See *Electric Bond & Share Co. v. S. E. C.*, 303 U. S. 419, 443.

#### CONCLUSION

The decision of the court below is correct. It turns largely upon the facts, and presents no question calling for further review. The petition should be denied.

Respectfully submitted.

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